28 March 2025

ATO Public Advice Feedback forum
Email: seocommittees@ato.gov.au

TR 2013/5 and COMPLIANCE CONCERNS

Chartered Accountants Australia and New Zealand, CPA Australia, Institute of Financial Professionals Australia, Institute of Public Accountants, and the SMSF Association (together the ('Joint Bodies') appreciate the ATO's engagement and thank you for your response dated 24 January 2025 regarding the industry's concerns with the updates to Taxation Ruling TR 2013/5 (the Ruling).

Whilst we acknowledge that the Ruling can only deal with matters relating to tax law, it is critical that it is acknowledged that there are broader consequences for all superannuation fund trustees, members and the sector as a whole.

Outlined below are some key issues. We seek the opportunity to engage in further dialogue to ensure practical, equitable outcomes for all those affected.

Issue 1: Need for Clear Compliance Guidance

We welcome the ATO's no compliance approach in identifying whether an income stream that ceased due to failing to comply with the pension standards in the 2023-24 and earlier income years was commuted and a new superannuation income stream commenced.

To ensure transparency and equitable treatment of all taxpayers we would like the ATO to consider communicating its compliance approach more broadly.

Further, we seek confirmation that trustees who acted in good faith based on the previous version of the Ruling will not be required to retrospectively amend prior-year fund and personal returns, recalculate tax components of member interests, or re-report TBA events where an underpayment occurred in the 2023-24 or earlier income years and a new pension was not commenced in accordance with the updated paragraphs 20 and 101 of the current Ruling.

We encourage the ATO to ensure that any administrative requirements arising from these changes do not impose an undue burden on affected trustees.

Seeking clarity and publication of the ATO's non-compliance approach.

Issue 2: Cessation of pensions due to failure to make minimum pension payments

Large segments of industry have maintained since TR 2013/5 was first published, to respectfully disagree with the ATO's view that an underpayment of the minimum pension amount causes the pension to cease and cannot be rectified.

Whilst we wait to see whether the latest ART decision *of QWYN and Commissioner of Taxation (Taxation and business) [2025] ARTA 83* will have any impact on the ATO's view, it is important to highlight some inconsistencies.

For example, it is difficult to reconcile the ATO's view in TR 2013/5 with the treatment of non-ABPs, including market linked income streams. Reference to the ATO's letter to the industry associations on 24 January 2025, states that *"it is not possible for a pension to comply with the standards in one year, not comply the next, and then comply again in subsequent years"*. However, we are aware of non-ABPs being treated differently for SIS purposes, despite having the same fundamental pension principles and tax outcome.

We have also been told that APRA has waived certain pension requirements, ensuring continued compliance under SIS and avoiding unintended tax consequences. This includes scenarios where trustees have miscalculated pension amounts or failed to make a final payment in a given financial year.

APRA's actions in regulating large funds have direct income tax consequences, making it critical that both regulators maintain an aligned and consistent approach to the interpretation and application of SIS regulations. No segment of the superannuation sector should be unfairly disadvantaged when addressing annual pension underpayments.

Seeking consistent industry wide administration and equity in tax outcomes.

To assist in ensuring consistent reporting and compliance across the sector, industry also seeks certainty on the treatment of transfer balance debits in scenarios where an ABP fails to meet the minimum pension standards during an income year. For example:

- We seek confirmation that a debit (such as a partial commutation) that occurs prior to the pension failing continues to be valid in accordance with paras 51E to 51H of LCR 2016/9;
- We seek confirmation that pension payments made before the failure that are later treated as lump sums are not to be reported as transfer balance debits; and
- We seek ATO confirmation on the correct value to use when calculating a debit under Item 6 of the table in subsection 294-80(1), consistent with LCR 2016/9.

  Where an ABP fails the pension standards during the year, there appears to be a need to prepare notional accounts assuming the pension remained in retirement phase until 30 June (the deemed time of failure), alongside year end accounts reflecting a non-retirement phase interest for the full year. This results in two different values at 30 June.

Seeking administrative certainty.

Issue 3: Reduction of compliance burden on lump sum withdrawals on pension failure

We acknowledge that the requirement to treat every payment from a failed pension as a lump sum is not a new issue. We also accept that when an ABP fails, the member's superannuation interest merges with any accumulation interest from the start of the financial year in which the underpayment occurred.

However, amendments to s307-200.05 of the ITAR (1997 Act) 2021 largely went unnoticed by the industry, only highlighted by the latest update to the Ruling . This impacts the tax-free and taxable components of the member's balance, requiring recalculation for every withdrawal made after the pension ceases.

This approach is misaligned with practical fund administration, creating an unnecessary administrative burden on trustees with little to no tax advantage. It requires fresh earnings allocations, valuations, and financial adjustments before every lump sum payment, adding complexity without materially impacting tax outcomes.

To address this, we would like to work with the ATO to develop an administrative solution that remains within the Commissioner's powers, does not materially affect tax outcomes, and preserves the integrity of the proportioning rules.

For example, assume a member had a $1 million pension with a 30% tax-free and 70% taxable split, and an accumulation balance of $500,000 that was fully taxable. Due to a pension underpayment, their interests merge from 1 July in the year of the underpayment.

Rather than requiring recalculation for each withdrawal from the failed pension, a safe harbour could allow trustees to apply the proportioning rule as determined on 1 July for the entire year. The combined interest would have a new 20% tax-free and 80% taxable split, which could be used consistently across all withdrawals in that financial year. This would simplify administration while maintaining the tax integrity of the fund.

Seeking an administrative solution.

Issue 4: Death benefit pension underpayment

We appreciate the ATO's clarification that a deceased pension remains an interest of the primary deceased pensioner. While we acknowledge that the resulting complexities may fall outside the immediate scope of this Ruling, this does not diminish their significance or the industry's need for clear and practical guidance. We welcome the opportunity to discuss these in the future.

In the meantime, we request that the ATO consider ways to broadly communicate its existing administrative approach to trustees breaching the compulsory cashing requirements in SIS Reg 6.21 due to a pension underpayment. The ATO's approach is already established, we simply seek greater transparency and broader publication of the ATOs view as originally contained in QC 59673, to ensure industry apply it consistently.

Seeking clarity and publication of the ATO's administrative approach.

Issue 5: Breach of the SISA operating standards

In its letter to the industry associations on 24 January 2025, the ATO said, *"it is also important to note that a breach of the minimum pension payment requirements for an ABP is not a breach of the operating standards and cannot lead to a non-complying status of a fund. The pension standards do not sit within the payment standards under Part 6 of the SISR (rather, they are made in relation to the definition of pension in subsection 10(1) of the SISA). Nor, contrary to your submission, is it a provision to which the administrative penalty regime applies."*

If the ATO's interpretation of the SISR concerning failure to comply with the minimum pension requirements is accepted, then for ABPs that are not Transition to Retirement Income Streams (TRISs) – as defined in SIS Reg 6.01(2) – we agree with the ATO's analysis.

However, we do not agree with the ATO's analysis in relation to TRISs. Further any lump sums deemed to have been paid from these pensions with preserved or restricted non-preserved benefits would also be a breach of the SISA operating standards.

Seeking clarity and publication of the ATO's views to promote consistent administration.

We thank you again for the opportunity to table these issues for further consideration

Yours sincerely,

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